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Eugene Francisconi v. Union Pacific Railroad Co. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

EUGENE FRANCISCONI, Plaintiff and Appellant, vs. UNION PACIFIC RAILROAD CO. a Utah Corporation, Defendant and Appellee.	Appeal No. 20000408-CA Case No. 960904423CV Priority No. 15

REPLY BRIEF OF APPELLANT

APPEAL FROM A FINAL JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, HON. STEPHEN L. HENRIOD

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I. The Trial Court's Failure to Strike Union Pacific's Amended Memorandum Was an Abuse of Discretion.

Union Pacific responds that the trial court did not abuse its discretion when it refused to deny the motion for summary judgment because it was not accompanied by a supporting memorandum of points and authorities as required by Rule 4-501(1)(A) of the Utah Code of Judicial Administration. (Br. App. at 42-43.)

The trial court entered an amended scheduling order establishing November 30, 1999, as the dispositive motion cutoff date. (R. 660-01.) On the last possible day, Union Pacific filed a motion for summary judgment. (R. 819-21.) That same day, the trial court denied Union Pacific's application to file the non-conforming memorandum in support of the motion for summary judgment. As such, when it filed the motion for summary judgment, and for nearly three weeks thereafter, Union Pacific had a motion but no supporting memorandum lodged in the trial court. The absence of a supporting memorandum meant that the motion for summary judgment did not comply with Rule 4-501(1)(A), and was subject to being stricken.

The trial court nevertheless allowed to Union Pacific to file the amended memorandum. The trial court's disregard for its own scheduling order was arbitrary. For no expressed or apparent reason, the trial court effectively adopted a new scheduling order. This was arbitrary, and an abuse of discretion.

II. The Trial Court's Failure to Strike Union Pacific's Exhibits was an Abuse of Discretion.

Union Pacific does not dispute that the affidavits of John Ivester, Janice Arthur and Michael Bernard had to "set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Utah R. Civ. P. 56(e). It further does not dispute that the exhibits in question must be admissible in evidence to be considered in support of summary judgment. (Br. of App. at 43-44.) These requirements mirror those that apply to the admissibility of all evidence.

"Application for Employment." Union Pacific responds that "Mr. Francisconi himself authenticated the Terms and Conditions of Employment, ..." (Br. App. at 44.) It quotes Mr. Francisconi's deposition testimony, where he recognized his signature on a page. (Br. App. at 44-45.)

Exhibit a to Union Pacific's memorandum in support of the motion for summary judgment was never shown to Mr. Francisconi at his deposition. Mr. Francisconi's counsel objected to the document that was offered at the deposition as an incomplete copy of whatever it purported to be. (R. 1198.) As for the three page document that he was shown at his deposition, Mr. Francisconi stated that he did not recognize the document, which was dated August 10, 1970, and did not recall signing it. (*Id.*) As such, Mr. Francisconi did not authenticate the document; he clearly stated he has no personal knowledge as to whether the document is or is not what it purports to be. (*Id.*)

Besides the testimony of Mr. Francisconi, Union Pacific proffered no other evidence to authenticate the "Application for Employment."[1] Consequently, the document should have been stricken. Union Pacific's plea to disregard the lack of authentication because "Mr. Francisconi has never argued that the document is a fabrication" (Br. App. at 45), should be rejected.

Union Pacific offers no response to Mr. Francisconi's claim that Mr. Bernard's affidavit does not overcome the hearsay objection. Mr. Bernard's affidavit contains only conclusory assertions. It contains no facts whatsoever establishing Mr. Bernard is a "qualified witness" with personal knowledge of the authenticity of the document, and establishing on the basis of personal knowledge the foundation required under Rule 803(6). *See Trolley Square Ass's v. Nielson*, 886 P.2d 61, 66 (Utah App. 1994). The only "fact" in Mr. Bernard's affidavit is the identification of his position as Director of Auditing. This "fact" alone could not qualify this document under the business records exception.

Further, Mr. Francisconi's signature on the document was not an admission as to the truth of the matter asserted, namely, that the document was his employment application. It was an abuse of discretion for the trial court to rely upon a document for which no personal knowledge whatsoever was offered to establish a hearsay exception.

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[1] At the end of footnote 18, Union Pacific makes a cursory and unsupported claim that "Mr. Bernard's affidavit is sufficient to authenticate the entire document." (Br. App. at 45 n. 18.) However, nowhere in his affidavit does Mr. Bernard allege, much less show, that he has personal knowledge of the document. He does not state, for example, that he witnessed the signature on the document.

Affidavit of John Ivester with attached "In Lieu of Lodging Schedule." Union Pacific responds, in the main, that Mr. Ivester's affidavit is not hearsay because it is based on "business records maintained in the normal course of business." (Br. App. at 47.) This response is misleading because, at the same time he asserts that business records form the foundation for his affidavit, Mr. Ivester also asserts each of the receipts submitted under the "in lieu of" policy excluded any information on the specific items that were purchased for a host. Thus, information on the purchase of each of the items listed in paragraphs 1 through 4 of Union Pacific's statement of facts was obtained from a source outside the company.

Union Pacific readily admits in its statement of facts that Mr. Ivester formed his opinions from American Express statements obtained by the company. (Br. App. at 4.) He also "contacted certain stores directly and obtained itemized" receipts. In the absence of direct testimony from an American Express records custodian, and the alleged store personnel, Mr. Ivester's affidavit was inadmissible hearsay because he had no personal knowledge of the receipts and the source of his information was hearsay.[2]

"Interview Summary" prepared by Janice Arthur. Objection is withdrawn to the admissibility of Ms. Arthur's affidavit.

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[2] The contention that the Schedule is accompanied by "circumstantial guarantees of trustworthiness" is misleading. Mr. Ivester has never identified the persons who provided the outside information upon which he relies. Mr. Francisconi moved to strike Mr. Ivester's affidavit precisely because the underlying source of the information is unknown.

"Summary" of alleged findings of corporate audit staff. Union Pacific responds that the "summary" qualifies as a business record under Rule 803(6). That rule requires the report to be transmitted by "a person with knowledge." Neither the "summary" nor the affidavit of Mr. Bernard identify the source of the matters asserted therein, and as such a particularized assertion of personal knowledge is entirely lacking.

Letter from Larry L. Reiff dated June 7, 1996. This letter is not subject to a business records exception through the testimony of Mr. Messner, who did not establish any foundation for the exception. Additionally, there is no showing the letter was prepared as part of a regularly conducted business activity.

Letter from Larry L. Reiff to Dennis Seals. The same argument.

Letter from Rene Orosco to Kevin L. Newton, and letter from D.D. Matter to Kevin L. Newton. Union Pacific has never authenticated these documents, or established any hearsay exception. Its conclusory allegation that these two letters are subject to a business records exception is without any merit. Clearly, the letters were not prepared as part of a regularly conducted business activity.

III. Summary Judgment Standard.

The proper standard is fully described as follows: summary judgment is appropriate only when, viewing the evidence in the light most favorable to Mr. Francisconi and drawing all reasonable inferences from the evidence in favor of finding a material issue of fact, no reasonable jury could conclude that an implied contract exists.

IV. Employment Contract Claims.

A. Gene Francisconi Did Not Agree in Writing to be an At-Will Employee.

Union Pacific contends that Mr. Francisconi agreed, in writing, to be an at-will employee, "and further no change in his status could occur except by an express writing on his employment contract."[3] (Br. App. at 14.)

Union Pacific's argument here is effectively this: even if Union Pacific makes a unilateral offer to form a contract with terms other than at-will, the offer is invalid in the event the "special conditions" section of the employment agreement is unannotated. The law is otherwise, however, and requires any such alleged disclaimer to be clear and conspicuous, and within the employee handbook that contains the offer. *See Hamilton v. Parkdale Care Center, Inc.*, 904 P.2d 1110, 1112 (Utah App. 1995).[4]

For the alleged "special conditions" provision to effectively disclaim any contractual limitation on Union Pacific's right to terminate Mr. Francisconi without cause, that provision must be a prominent part of the handbooks that constitute the "in lieu of" policy

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[3] This argument is ironic because, when he began his employment with Union Pacific in 1970, Mr. Francisconi was not an at-will employee. As a union employee until 1976, Mr. Francisconi was classified as an "agreement employee." (R. 1024.) There is no "special condition" noted in the subject document to reflect the fact that, for the first five years of his employment, Mr. Francisconi was not an at-will employee. Additionally, the document Union Pacific denominates "Terms and Conditions of Employment" was a subject of Mr. Francisconi's motion to strike fact exhibits, and is inadmissible.

[4] *Hamilton* provides that factors relevant in determining whether a disclaimer is clear and conspicuous include: "(1) the prominence of the text; (2) the placement of the disclaimer in the handbook; and (3) the language of the disclaimer." *Id.*

and the UPGRADE Policy. However, the alleged "special conditions" disclaimer is not a part of these handbooks, and is an inconspicuous part of a separate document bearing a 1970 date. (R. 097-0104.) Further, the two implied contracts created by Union Pacific's oral promises have no connection whatsoever to a handbook. Accordingly, the alleged "special conditions" disclaimer is without effect.

The issue in question is whether Union Pacific made the four unilateral offers of employment other than at-will. If it did, then any alleged "special conditions" disclaimer tucked away in an aged document is irrelevant. *See Perry v. Sinderman*, 408 U.S. 593, 603 (1972) (employer's de facto and written policies may create employment contract even where policy manual states to the contrary). Each such offer from Union Pacific implicitly waived any right to later enforce a "special conditions" disclaimer.

B. The "In Lieu of" Policy Created an Implied Contract.

Union Pacific responds that the "in lieu of" policy does not manifest an intent to offer employment other than at-will. (Br. App. at 17.) The response is misplaced. While focused on the "in lieu of" policy, this implied contract arises from the broader circumstances of Mr. Francisconi's employment.

Mr. Francisconi could not perform the job of safety manger without extensive travel. (R. 1252-53.) The inference must be made in favor of Mr. Francisconi that the parties contemplated that extensive travel would result in necessary use of the expense policy, and in particular the "in lieu of" policy. The ability to anticipate that the expense

policy would have to be used meant that the parties were aware an implied contract had been offered and accepted. Thus, Mr. Francisconi agreed to use the expense policy, and thereby perform his job, in return for a promise that Union Pacific would not terminate him for his proper use of the "in lieu of" policy.

Union Pacific contends that Mr. Francisconi abused the "in lieu of" policy, and that this renders *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744 (Idaho 1989) distinguishable. But Mr. Francisconi's use of the "in lieu of" policy is highly disputed.

Although a decision of the Idaho Supreme Court, *Metcalf* is in fact on point. There is no other case in Utah that is analogous to this situation. *Robertson v. Utah Fuel Company* is distinguishable because the drug policy in that case was not an integral part of the plaintiff's employment. Here, by contrast, Mr. Francisconi could not perform his job without using the expense policy.[5]

C. The UPGRADE Policy Created an Implied Contract.

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[5] The case of *Cook v. Zions First Nat'l Bank*, 919 P.2d 56 (Utah App. 1996) is instructive. There the employer argued, much as Union Pacific does, that the sick leave policy merely provided a schedule for accrual of sick leave. *Id.* at 59. This Court rejected that argument as too narrowly drawn. Such an interpretation "would defeat the very purpose for which parties contract to obtain sick leave. Employees do not contract with an employer to receive sick leave merely to watch their hours accrue. At some point, the employees will use those accrued hours to take time off to take care of their health." *Id.* Applied to the formation of an implied contract other than at-will, the court in *Metcalf*, applying another sick leave policy, concluded that the act of offering a policy signifies more than just the mere right to, for instance, accrue sick leave or, as here, obtain reimbursement of expenses. 788 P.2d at 749.

Union Pacific mainly responds that the UPGRADE Policy does not manifest an intent to offer employment other than at-will. (Br. App. at 20-23.) Contrary to Union Pacific's assertion, opposition to the motion for summary judgment relies exclusively on objective evidence. Mr. Francisconi believes that Level 5 UPGRADE was available to him, but it is only the objective evidence, and in particular Union Pacific's conduct and words, that is relevant. This objective evidence is almost entirely undisputed.

Union Pacific does not dispute that the UPGRADE Policy makes certain promises to a terminated employee, including the guarantee of a formal hearing, and review by an executive committee.[6] It also does not dispute that Mr. Francisconi was terminated without the benefit of these Level 5 procedures; Level 5 UPGRADE contains no language excluding managers from its procedures; Mr. Francisconi never received training in the UPGRADE Policy, or was otherwise told by anyone that managers are excluded from coverage; and a Vice President of Union Pacific could not say that a writing has ever been sent to employees stating that the UPGRADE Policy is not available to managers.

Nor does Union Pacific dispute that it caused the handbook constituting the UPGRADE Policy to be affirmatively delivered to Mr. Francisconi; there was no reason

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[6] For instance: "A formal hearing is required for Level 5 cases." (R. 1148.) "Discipline cases for Level 5 violations will be reviewed for consistent policy application by an Executive Committee consisting of Representatives from human Resources, Labor Relations, and the Employing Department." (R. 1145.) At the time of the Omaha meeting, Mr. Francisconi understood Level 5 UPGRADE "to mean that I would have the right to a hearing on the merits of my dismissal, and the right to have a committee review any adverse decision resulting from the hearing." (R. 1279.)

for Mr. Francisconi to receive the pamphlet, the cover page for which is dated May 27, 1994, if it did not apply to him since he had not supervised employees since 1976; at least two present or former managers of Union Pacific testified they believe the UPGRADE Policy applies to all employees, including themselves; and Union Pacific's representatives mentioned UPGRADE to Mr. Francisconi at the meeting in Omaha on April 26, 1996.

As argued in the principal brief, it cannot be said that no reasonable jury, viewing the evidence in the light most favorable to Mr. Francisconi, and drawing all inferences from the evidence in favor of finding a material issue of fact, could conclude that these objective facts created an implied contract. Union Pacific delivered the handbook to Mr. Francisconi, and the handbook contains an express offer of employment other than at-will with respect to discharge. Indeed, Union Pacific does not dispute Mr. Francisconi's claim that Level 5 UPGRADE limits its right to discharge an employee, but contends that the limitations do not apply to Mr. Francisconi.

In response to this showing, Union Pacific refers to certain language and "structure" of the UPGRADE Policy, and claims that the Policy has "never" been applied to managerial employees. (Br. App. at 20-23.)

Union Pacific does not recite language in the UPGRADE Policy which expressly excludes managers from coverage, or expressly limits coverage to union employees. Instead, it retreats to an argument that the UPGRADE Policy must be "`read as a whole, in an attempt to harmonize and give effect to all of the contract provisions.'" (Br. App.

at 20, *quoting Elm, Inc. v. M.T. Enterprises, Inc.*, 968 P.2d 861, 863 (Utah App. 1998).) However, *Elm* is inapposite, and concerned a dispute between an employee lessor and employee lessee in connection with the payment of payroll and other expenses. That case establishes no rule of construction applicable to an implied employment contract.[7]

The language invoked by Union Pacific is irrelevant because the claim in question is predicated on breach of an implied contract wherein Union Pacific did not comply with its procedure for discharge. Mr. Francisconi has never alleged that other procedures in the UPGRADE Policy created employment other than at-will since they do not concern discharge. Only Level 5 UPGRADE concerns discharge, and therefore only Level 5 UPGRADE could create an implied contract of employment other than at-will. Only the direct references to Level 5 UPGRADE are relevant.

As noted above, Union Pacific does not dispute that Level 5 UPGRADE limits its right to discharge an employee. Accordingly, Union Pacific's request for consideration of other language in the UPGRADE Policy is really a claim that the handbook contains one or more disclaimers.

As further noted above, a disclaimer is only effective if it is clear and conspicuous. See *Hamilton*, 904 P.2d at 1112. Union Pacific claims the UPGRADE Policy contains

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[7] No Utah court has ever required an employee-plaintiff to show that a handbook is susceptible to harmonization. Indeed, such a rule of construction would make no sense in this context since, by definition, an implied contract is created from the totality of the circumstances, which may or may not include a single, written document.

references to "collective bargaining agreements" and to "interactions" between management and union representatives. (Br. App. at 21.) However, none of these references concerns discharge. Further, none of these references contains prominent text, is set off in the handbook, or employs disclaiming language. As such, the language and "structure" referenced by Union Pacific may not serve to disclaim the offer the Policy makes through Level 5 UPGRADE.

Even if the offer concerning Level 5 UPGRADE is interpreted along with the other language invoked by Union Pacific, the UPGRADE Policy still provided a definite offer to Mr. Francisconi. A reasonable employee such as Mr. Francisconi would have read Union Pacific's chosen language in conjunction with the first page of the handbook–the only page likely to be read by all employees who received the handbook. The first page is a letter from the Chairman and CEO of Union Pacific, and is addressed to his "Fellow Employee." (R. 1143.) It goes on to provide that the UPGRADE Policy would be implemented "across the entire railroad system," and would benefit "all employees." (*Id.*) Thus, any reference in the text of the Policy to collective bargaining agreements or "interaction" between management and union representatives would be perceived by a reasonable person as entirely consistent with the representation that the UPGRADE Policy concerns "all employees" of Union Pacific.

Certainly, Union Pacific is not the first employer to claim that grievance procedures found in an employee handbook do not apply to managers. In *Jones v. Lake Park Care*

Center, Inc., 569 N.W.2d 369 (Iowa 1997), for instance, an employer argued that an employee handbook was not intended to apply to the administrator of a care center. The Iowa Supreme Court rejected the employer's argument, and affirmed the trial court's award of damages to the administrator for the employer's failure to follow a progressive discipline policy. The court found persuasive certain language of the handbook which provided, in pertinent part, as follows:

> This booklet is designed to inform *every employee* of what is expected from them as an employee f the Lake Park Care Center, and also to tell *all employees* what they can expect of the Lake Park Care Center.

Id. at 375 (original italics). Similarly, the page one references to "all employees" of Union Pacific and implementation "across the entire railroad system" evidenced an objective intent to offer employment other than at-will.

Just as it was in the trial court, Union Pacific's claim that the UPGRADE Policy has "never" been applied to managerial employees is still a red herring. Union Pacific's subjective belief that the UPGRADE Policy does not apply to managers is irrelevant, just as Mr. Francisconi's subjective belief is not dispositive. Thus, largely unsubstantiated statements concerning the UPGRADE Policy's "history" have no bearing on this inquiry. All that matters are the words and conduct of Union Pacific as communicated to Mr. Francisconi. Judge Learned Hand explained this rule:

> A contract has, strictly speaking, nothing to do with the personal, or individual intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words,

> which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held . . . .[*Hotchkiss v. Nat'l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911).]

Thus, irrespective of what the employer purportedly intended, the delivery of the UPGRADE Policy along with all the other objective circumstances recounted above created an implied contract of employment other than at-will.[8] The terms: a grievance procedure at least equivalent to Level 5 UPGRADE, including a formal hearing on the merits of the discharge.

D. The Oral Promise that Gene Francisconi Could Keep His Job in Exchange for Signing the Statement Created an Implied Contract.

As set forth in the principal brief, this claim is based on an oral promise made to Mr. Francisconi towards the end of the Omaha meeting on April 26, 1996. Mr. Francisconi posed the question of what he could do to keep his job and avoid discharge as a result of the company's audit. Union Pacific's representative, Gary Lottman, replied that Mr. Francisconi could keep his job in exchange for writing and signing a statement that Mr. Lottman would dictate to Mr. Francisconi.[9] (R. 1387.) Mr. Francisconi accepted this

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[8] Union Pacific's reference to *Sorenson v. Kennecott-Utah Copper Corp.*, 873 P.2d 1382 (Utah App. 1995) is misplaced. That case was reviewed on appeal after a trial, not summary judgment. *Id.* at 1143. The case was decided on the finding that the handbook excluded any requirement of a written warning or suspension subject to a hearing before discharge. *Id.* As such, the subsequent comments in the decision are dicta.

[9] Mr. Lottman: "'What do you think you need to do to keep your job?'" (R. 1264.) Mr. Francisconi: "'Well, you tell me what I need to do. I'm willing to make restitution if you

offer, and wrote out the statement that Mr. Lottman dictated to him because it was Mr. Francisconi's "understanding that by giving this statement I was saving my job." (R. 1264.) Mr. Lottman admits he suggested Mr. Francisconi provide a statement. (R. 1344.)

Union Pacific's response is that its representatives at the meeting, all of whom are still employees, contradict Mr. Francisconi's account. (Br. App. at 25.) It is axiomatic that "`[o]ne sworn statement under oath is all that is necessary to create a factual issue, thereby precluding summary judgment.'" *Nyman v. McDonald*, 966 P.2d 1210, 1213 (Utah App. 1998) (*quoting Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 957 (Utah App. 1989)). Any question of Mr. Francisconi's credibility is for the fact finder.

Sanderson v. First Sec. Leasing Co., 844 P.2d 303, 307 (Utah 1992) and *Wood v. Utah Farm Bureau Insur. Co.*, 2001 UT App 35, 19 P.3d 392 require reversal of the trial court on the basis of Mr. Francisconi's sworn testimony.[10] The meeting in Omaha concerned Mr. Francisconi's use of the "in lieu of" policy. (Br. App. at 3-4.) Mr. Francisconi was told he could keep his job if he signed the statement concerning his use

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think I've done something wrong. Tell me what you want me to do.'" Mr. Lottman: "'Well, the first you can do to save your job is to fill out a statement.'" (*Id.*)

[10] The continuing vitality of *Sanderson* (holding that an oral statement that "the job would be there" when the employee recovered from his illness was a clear manifestation of intent not to terminate), was recently reaffirmed in *Wood*, wherein this Court reversed the trial court's grant of summary judgment in favor of the employer because the employee established a question of fact as to whether an implied contract existed. The employee stated in his affidavit that a manager "in our weekly review sessions after I signed the 1994 Career Agent Contract, affirmed to me that I would not be terminated unless I failed to meet the goals in the October 15, 1993 letter." *Id.* 19 P.3d at 398.

of the "in lieu of" policy. (R. 1264; R. 1344.) Effective the next day, Union Pacific terminated Mr. Francisconi solely for alleged violations of the "in lieu of" policy. (R. 1377.)

Union Pacific further responds that the "Railroad never actually promised he could keep his job in exchange for a statement. Rather, Mr. Lottman allegedly said the `first thing' he could do to save his job was to fill out a statement. . . ." (Br. App. 25, emphasis removed.) This argument turns on the existence of intervening conditions of continued employment. Thus, Union Pacific's argument must fail because it does not point to any intervening conditions it attached to its promise that Mr. Francisconi could keep his job in exchange for the statement. By making the statement the first thing required for Mr. Francisconi to keep his job, and then not requiring anything else, the statement was in fact the only thing Union Pacific demanded in return for the promise of continued employment.

Union Pacific's promise in this regard clearly manifests an intent to limit its right to terminate Mr. Francisconi in connection with his use of the "in lieu of" policy. Either with or without the words "first thing," Union Pacific promised Mr. Francisconi he could keep his job in exchange for the statement. There was nothing ambiguous about the objective import of Union Pacific's words: provide the statement, and you can "keep your job." (R. 1387.)

The argument that the implied contract lacks consideration is disingenuous. It is well established that an employee's continued employment supplies adequate consideration

to support an employer's unilateral offer of employment other than at-will. *See, e.g., Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 401 (Utah 1998).[11]

The fact that Mr. Francisconi disavows the statement has no bearing on the adequacy of the consideration given to Union Pacific. Courts do not as a rule inquire into the adequacy of consideration. *Reese v. Reese*, 1999 UT 75, ¶ 27, 984 P.2d 987, 995. Union Pacific requested the statement in exchange for the promise, and, because Mr. Francisconi prepared the statement dictated to him by Mr. Lottman, it received all that it was due. *See Gorgoza, Inc. v. Utah State Road Comm'n*, 553 P.2d 413, 416 (Utah 1976) ("If one party asks for and receives something which he would not otherwise be entitled to from the other, that is adequate consideration.")

Because Mr. Francisconi alleges that there are circumstantial indicators that he was terminated due to the personal animosity of Mr. Shoener, Union Pacific concludes that Mr. Francisconi is foreclosed from establishing the existence of an implied contract on the basis of Mr. Lottman's promise. (Br. App. at 28.)

Union Pacific's argument in this regard is non-sensical. Union Pacific's quotation from *Sanderson* is inapposite because it would only affect the situation in which the employer shows that the employee was terminated for a reason unrelated to the oral promise. Here, by contrast, Union Pacific claims it terminated Mr. Francisconi in

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[11] But for Union Pacific's wrongful termination of Mr. Francisconi, he would have continued his employment of 26 years. Union Pacific cannot claim that it did not receive the return benefit of Mr. Francisconi's employment when it had terminated him.

connection with his use of the "in lieu of" policy. (R. 1377.) Mr. Francisconi's use of the "in lieu of" policy is the subject of Mr. Lottman's promise.

E. The Oral Promise that Gene Francisconi Could Choose Level 5 UPGRADE Created an Implied Contract.

After Mr. Francisconi had signed the statement, Union Pacific's senior representative at the Omaha meeting, Neil Vargason, offered Mr. Francisconi the opportunity to invoke Level 5 UPGRADE in exchange for continued employment. (R. 1265.)[12] Mr. Vargason admits he may have mentioned Level 5 UPGRADE to Mr. Francisconi (R. 1366). Mr. Lottman admits he definitely mentioned Level 5 UPGRADE. ("I brought up the UPGRADE Policy to him.") (R. 1345.) Mr. Vargason promised Mr. Francisconi he could keep his job, subject to Level 5, or its equivalent, review of his employment. Mr. Francisconi accepted the offer, but was discharged effective the next day.

Union Pacific's promise was functionally the same as the employer's promise in *Wood v. Utah Farm Bureau Insur. Co.* There the employee was told he would not be terminated "*unless* I failed to meet the goals in the October 15, 1993 letter." 19 P.3d at 398 (emphasis added). That is no different than requiring Mr. Francisconi to satisfy Level 5 review of his employment.

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[12] Mr. Vargason: "'You have two choices. We can either put you in Level 5 of UPGRADE or you can sign a resignation which we have prepared for you at this time to sign.'" Mr. Francisconi: "I informed them I had no intention of signing a resignation and put me in Level 5 of UPGRADE . . ." (R. 1265.)

Union Pacific further responds that Mr. Francisconi should have known that the offer was invalid because he should have known the UPGRADE Policy is not available to managers. In other words, Mr. Francisconi should have known that Union Pacific was making a bogus offer. But even assuming Level 5 UPGRADE was not available to managers, Union Pacific could still make the offer. It could at any time agree to modify the terms of Mr. Francisconi's employment. Thus, the promise of Level 5 UPGRADE meant at least the equivalent of a formal hearing on the merits of the discharge. (R. 1265.)

V. Intentional Infliction of Emotional Distress.

Union Pacific responds that, on the basis of the facts recited in the principal brief, Mr. Francisconi cannot satisfy his burden of showing that Union Pacific conducted itself in a way that offends the generally accepted standards of decency and morality.

The summary facts set forth in Mr. Francisconi's principal brief will not be repeated here. That presentation is not exhaustive, as it would be at trial. The facts can be classified according to three time periods: (1) the coercion and threats made at the Omaha meeting on April 26, 1996; (2) the continued threats and harassment that followed the meeting and through May 17, 1996, when Mr. Francisconi informed Union Pacific that he would not resign; and (3) the period after May 17th and until COBRA coverage was finally provided on July 8, 1996. Evidence of Union Pacific's malice is also shown by the extraordinary way in which Mr. Francisconi was singled out from all other audited employees, and the indicators that Union Pacific, acting through its Vice President, Arthur

Shoener, may have terminated Mr. Francisconi due to base personal animosity and revenge.

These facts are substantial and largely undisputed. They reveal that Union Pacific's conduct was not pursuant to the exercise of legal rights. When the facts are viewed in the light most favorable to Mr. Francisconi, and all inferences are drawn from the facts in favor of Mr. Francisconi, a triable issue is raised as to whether Union Pacific acted beyond the strict confines of its examination of Mr. Francisconi's use of the "in lieu of" policy.

The undisputed facts show, for example, that Union Pacific pursued a criminal case against Mr. Francisconi even though Union Pacific has *never* made a criminal referral as a result of an expense report audit. (R. 1571, at 3.)

Moreover, contrary to the assertion in its response brief, Union Pacific improperly withheld COBRA coverage. By its own admission, when Mr. Francisconi could not be coerced into signing a resignation and release of liability agreement, Union Pacific backdated his termination date to April 27, 1996, the day after the Omaha meeting. (Br. App. at 8.) It then allowed his group medical coverage to lapse effective April 30, 1996. (*Id.*)

Union Pacific did not deny COBRA coverage due to "gross misconduct" on the part of Mr. Francisconi. Thus, the termination was a "qualifying event" obligating Union

Pacific to notify Mr. Francisconi and his wife (also a beneficiary) within 44 days[13] of his right to continuation coverage. Union Pacific has offered as proof of notification a letter from Larry Reiff dated June 7, 1996 (Br. App. at 32), but the undisputed evidence shows that Mr. Francisconi did not receive actual notice until June 20, 1996. (R. 1220.) He elected coverage for his wife, and returned the election form the next day. (Id.) Notice was therefore received 54 days after termination, in clear violation of federal law. Coverage did not actually attach until July 3, 1996. (*Id.*)

The claims herein do not include violation of the notice requirements of COBRA,[14] but Union Pacific's disregard for those requirements shows its malice. An Assistant Vice President of Union Pacific, Thomas Campbell, who knew that Ms. Francisconi suffered

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[13] Under 29 U.S.C.A. § 1166(a)(2), an employer has a duty to report most qualifying events, including the termination of employment, to its group health plan administrator within 30 days of the qualifying event. *Geissal v. Moore Med. Corp.*, 524 U.S. 74, 81, 118 S.Ct. 1869, 1873 n. 6 (1998). The plan administrator has 14 days from notification to provide notice to the qualified beneficiary of the right to elect continuation coverage. *Burgess v. Adams Tool & Engineering, Inc.*, 908 F.Supp. 473, 478 (W.D. Mich. 1995) (citing 29 U.S.C.A. § 1166(a)(4)). Where the employer is also the plan administrator, the courts are split on the notice requirements. In *Hamilton v. Mecca, Inc.*, 930 F.Supp. 1540, 1553 (S.D. Ga. 1996), for example, the court held that the employer/plan administrator had to notify the employee within 14 days of termination of his right to continuation coverage. Larry Reiff is an employee of Union Pacific, and provided notification to Mr. Francisconi. (R. 1137.) As such, Union Pacific is both the employer and plan administrator, and may have been required to notify Mr. Francisconi within 14 days of termination of his right to elect continuation coverage. However, no resolution of the lack of consensus is necessary because Union Pacific failed to provide notice within even the enlarged 44 day period.

[14] A beneficiary may seek relief under 29 U.S.C.A. § 1132(a) against a plan administrator who fails to comply with the notice requirements.

from medical problems, in early May 1996, threatened Mr. Francisconi with cancellation of group medical insurance and denial of continuation coverage if he would not sign the release of liability agreement. (R. 1266-67.) This threat was repeated, and caused Mr. Francisconi great stress since his wife was scheduled to undergo non-elective surgery on June 5, 1996. (R. 1220.) That surgery was in fact canceled due to Union Pacific's failure to provide notice.[15] (*Id.*)

This Court and the Utah Supreme Court have variously described the standard applicable to an intentional infliction of emotional distress claim. What has remained constant, however, is the requirement that the objectionable conduct offends the generally accepted standards of decency and morality. In *Retherford v. AT&T Communications*, 844 P.2d 949, 969-70 (Utah 1992), for instance, that meant conduct consisting of "shadowing [plaintiff's] movements, intimidat[ing] her with threatening looks and remarks, and manipulat[ing] circumstances at her work in ways that made her job markedly more stressful. . ."

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[15] Congress, as one court stated, "did not enact COBRA for the purpose of providing employers with another negotiating lever." *Lloynd v. Hanover Foods Corp.*, 72 F.Supp.2d 469, 477 (D. Del. 1999) (finding that employer attempted to coerce employee to recharacterize her termination as "resignation" in exchange for which employer would agree to extend COBRA benefits; the court was "deeply disturbed by [the employer's] improper use of COBRA as a negotiating tool.") A higher level of concern should prevail here in light of the state of Ms. Francisconi's health at the time Union Pacific was using COBRA benefits as a negotiating tool to coerce a resignation.

VI. Defamation.

Union Pacific responds that its communications were privileged. (Br. App. at 35-36.) But this response must fail because a qualified privilege does not protect a defamatory statement when the defendant acted with malice or the statement is excessively published. *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 58 (Utah 1991). Mr. Francisconi has raised a triable issue as to whether Union Pacific's agents were motivated by malice, which "is ordinarily a factual issue." *Id.* at 59 (*citing Lind v. Lynch*, 665 P.2d 1276, 1279 (Utah 1983)).

Moreover, the statements from Union Pacific's agents to Thomas Haig, and from Thomas Haig to Barbara Tower, were excessively published. Union Pacific does not show that Mr. Haig or Ms. Tower had any connection to the audit. Additionally, the fact that Mr. Francisconi has not shown the basis for Mr. Haig's utterance to Ms. Tower is unavailing to Union Pacific because it may be inferred that the only available source of the statements was the audit staff and the participants at the Omaha meeting. Within Union Pacific, only these persons had a valid reason for knowing the audit results.

Union Pacific contends its descriptions of Mr. Francisconi as a liar and a thief and threats of criminal prosecution were "nothing more than the Railroad confronting an employee on a legitimate matter of concern to the company–abuse of the `in lieu of' policy." (Br. App. at 36.) A qualified privilege attaches only to "certain situations in which a defendant seeks to vindicate or further an interest `regarded as being sufficiently

important to justify some latitude for making mistakes....'" *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 58 (Utah 1991) (quoting Prosser and Keeton on the Law of Torts). But it cannot be said that the company's concern for "abuse of the `in lieu of' policy" had any connection to the defamatory statements.

The fact that Union Pacific's agents made the statements directly to Mr. Francisconi at the meeting in Omaha does not preclude a claim for defamation, since persons in addition to the speakers were also present. Six persons attended the meeting in addition to Mr. Francisconi. (R. 1254.) Union Pacific does not show that all its agents at the meeting uttered defamatory statements.

VII. Fraud.

Union Pacific responds that Mr. Francisconi's testimony cannot create a genuine issue of material fact. (Br. App. at 39-40.) The argument again focuses on the words "first thing" in connection with Mr. Lottman's request that Mr. Francisconi prepare the statement. As noted above in the section on contract claims, these words do not detract from the promise that was made because Union Pacific does not point to intervening conditions; the statement was in fact the only condition of the promise. Moreover, the fact that Union Pacific's current employees contradict Mr. Francisconi's testimony concerning Mr. Lottman's promise is without affect. A jury could still find in favor of Mr. Francisconi based solely on his testimony.

The contention that the promise of continued employment concerned a future act on the part of Union Pacific turns on the characterization of what was being offered. Union Pacific effectively terminated Mr. Francisconi at the Omaha meeting. Thus, the threat of termination was presently existing when the promise was made at the meeting.

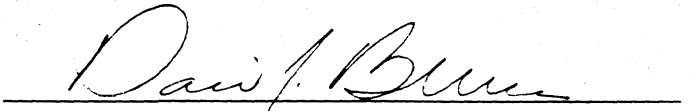
Mr. Francisconi relied on the misrepresentation to his detriment because the inference must be made in his favor that by asking for the statement, Union Pacific would not have terminated him in the absence of a statement.

CONCLUSION

Based on the foregoing, Mr. Francisconi respectfully requests that the Court reverse the trial court's entry of judgment in favor of Union Pacific and remand this case for a trial.

RESPECTFULLY SUBMITTED this 22nd day of May, 2001.

PARSONS, DAVIS, KINGHORN & PETERS



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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of May, 2001, I served the foregoing **REPLY BRIEF OF APPELLANT** by mailing a copy thereof, by first-class United States mail, postage prepaid, and addressed as follows:

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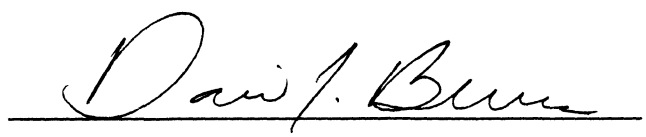

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